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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL KIRBY,

Plaintiff,

v.

CITY OF EAST WENATCHEE and
OFFICER JAMES MARSHALL,

Defendants.

NO. CV 12-190-JLQ

**DEFENDANTS' MEMO RE
ADMISSIBILITY OF
STATEMENTS MADE IN COURT
ON BEHALF OF PLAINTIFF BY
PLAINTIFF'S LAWYER**

I. INTRODUCTION

At the pre-trial conference on July 12, 2013, the Court requested additional briefing on the admissibility of statements made by Plaintiff's lawyer on behalf of

1 Plaintiff at the time of the hearing in state court that established Plaintiff's guilt to
2 a felony charge of third degree assault of a police officer.

3 II. STATEMENT OF FACTS

4 On June 21, 2010, Plaintiff pleaded guilty to a felony of third degree assault
5 in connection with the occurrence on April 5, 2009. (Defendants' proposed
6 Exhibit No. 526.) "The elements are: unlawfully, feloniously and intentionally
7 assault an employee of a law enforcement agency." (Id.) A transcript was made of
8 Plaintiff's guilty plea and sentencing. (Defendants' proposed Exhibit No. 527.)
9 Plaintiff was represented by attorney Dale M. Foreman at the hearing. (Id.)
10 During the hearing, while speaking on behalf of Plaintiff, Mr. Foreman stated:
11

12 Tragically, he got Parkinson's disease. And one of the consequences
13 of the Parkinson's disease was, he could no longer continue as a
14 postal carrier. . . . [H]e was very depressed. He was confused. He
15 was on heavy medication for his Parkinson's disease and as the
16 disease progressed, he had less and less control over his arms and his
17 legs. He was sort of housebound and had child support and custody
issues and he just fed on these depressing factors. He was 50 years
old and he was getting very ill and was suicidal.

18 And on April 5th, 2009, he thought he was going to end his suffering
19 and end the Parkinson's suffering and end his problems by killing
20 himself and he sat in his living room with a weapon and called some
21 people, basically calling out for help. And the people he called did
22 properly inform the police and the police came and Mike walked out
23 on his front porch holding a shotgun. And his testimony would be
that he never intended to hurt anybody other than himself, but the
police didn't know that. *And given the fear that was, I think, normal
for the police under those circumstances, a tragic thing happened.*

1 Mike put down the shotgun, but he was shot in the jaw from
2 approximately a hundred yards away or may not quite that far, but it
3 was a long shot

4 .We were hopeful that the prosecutor would not file any charges,
5 given the suffering Mike has gone through, but ***I have to say given the***
6 ***facts, it's understandable that the police felt in fear and I think that***
7 ***the crime, assault in the third degree, is a realistic charging under***
8 ***the tragic circumstances.***

9 And one of the best things that's happened out of this is his counselors
10 . . . have said he accepts what happened. He bears no hatred or ill will
11 towards people and he's made a remarkable mental recovery, but he is
12 still in the midst of a prolonged physical recovery

13 (Id. at 10-12.) (Emphasis added.)

14 On March 1, 2013, Plaintiff's deposition was taken. Plaintiff answered
15 "Yes" to the questions: (1) "Now, you were represented by Dale Foreman, a – an
16 attorney in Wenatchee, correct.?" – (2) "And Mr. Foreman had the authority to
17 speak for you; isn't that true?" (Depo. of Plaintiff at 19.) During the deposition,
18 it was also asked and answered as follows:

19 Q All right. And then I want you to look at page 11 of the official
20 transcript . . . where Mr. Foreman is still speaking to the Court
21 on your behalf. And he says (as read): "We were hopeful that
22 the prosecutor would not file any charges, given the suffering
23 that Mike has gone through, but I have to say that given the
24 facts, it is understandable that the police felt in fear and I think
that the crime, assault in the third degree, is a realistic charging
under the tragic circumstances."

Do you deny that Mr. Foreman made that statement in
front of the Court on your behalf?

1 MS. KAYS: -- to form. Foundation.

2 A No.

3 (Depo. of Plaintiff at 22-23.)

4 **III. STANDARD OF REVIEW**

5 The district court is given “wide discretion in determining the admissibility
6 of evidence under the Federal Rules.” Acosta v. City of Costa Mesa, -- F.3d --,
7 2013 WL 1847026, *20 (9th Cir. 2013), quoting United States v. Abel, 469 U.S. 45,
8 54, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).

9 **IV. APPLICABLE COURT RULE**

10 FED.R.EVID. 801(d)(2)(D) provides:

11 A statement that meets the following conditions is not hearsay: . . .
12 The statement is offered against an opposing party and . . . was made
13 by the party’s agent or employee on a matter within the scope of that
14 relationship and while it existed

15 **V. ARGUMENT**

16 **STATEMENTS MADE BY AN ATTORNEY CONCERNING A MATTER**
17 **WITHIN THE SCOPE OF THE ATTORNEY’S REPRESENTATION OF A**
18 **CLIENT MAY BE ADMITTED AGAINST THE CLIENT AS**
19 **SUBSTANTIVE EVIDENCE.**

20 “An attorney may be the agent of his client for purposes of Rule
21 801(d)(2)(D).” United States v. Harris, 914 F.2d 927, 931 (7th Cir. 1990). “As a
22 general rule, statements made by an attorney concerning any matter within the
23 scope of his employment are admissible.” U.S. v. D.K.G. Appaloosas, Inc., 630

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1 F.Supp. 1540, 1564 (E.D.Tex. 1986), aff'd 829 F.2d 532 (5th Cir. 1987), citing
 2 United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984); Fed.R.Evid.
 3 801(d)(2)(D). Statements by a party's lawyer "[i]f . . . made in a pleading or in
 4 trial, or are sufficiently formal or conclusive . . . may be treated as binding judicial
 5 admissions." D.K.G. Appaloosas, supra at 1564.
 6

7 Even pleadings composed by an attorney in a prior case may be used as
 8 evidentiary admissions against the client. Williams v. Union Carbide Corp., 790
 9 F.2d 552, 555-56 (6th Cir. 1986). The law on this issue before the court was
 10 succinctly stated at 555-56 by the Williams court:
 11

12 It is the general rule that "statements made by an attorney concerning
 13 a matter within his employment may be admissible against the party
 14 retaining the attorney." United States v. Margiotta, 662 F.2d 131, 142
 15 (2nd Cir. 1981), *cert. denied* 461 U.S. 913, 103 S.Ct. 1891, 77
 16 L.Ed.2d 282 (1983). An opening statement made by an attorney is
 17 admissible in a later lawsuit against his client. United States v.
 18 McKeon, 738 F.2d 26 (2nd Cir. 1984). An administrative claim filed
 19 by an attorney may also be an admission of his client. United States
 20 v. Flores, 628 F.2d 521 (9th Cir. 1980). Pleadings in a prior case may
 21 be used as evidentiary admissions. Contractor Utility Sales v.
 22 Certain-Teed Products Corp., 638 F.2d 1061, 1084 (7th Cir. 1981). In
 23 this case there is no question that the plaintiff's attorney was fully
 24 authorized to act and speak for the plaintiff. The statements made in
 the previous lawsuit were proper for impeachment under Federal Rule
 of Evidence 613. Id. As party admission, the allegations would also
 be available as substantive evidence under Federal Rule of Evidence
 801(d)(2).

See also 2 McCormick on Evidence § 259 (7th ed. – updated March 2013):

"When a party to the suit has expressly authorized another person to speak, it is an

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1 obvious and accepted extension of the admission rule to admit against the party the
2 statements of such persons.” The same section of McCormick on Evidence stated:

3 *Attorneys.* If an attorney is employed to manage a party’s conduct of
4 a lawsuit, the attorney has *prima facie* authority to make relevant
5 judicial admissions by pleadings, by oral or written stipulations, or by
6 formal opening statement, which unless allowed to be withdrawn are
conclusive in the case.

7 In U.S. v. Saraw, 2009 WL 3929558 (11th Cir. 2009), the Circuit Court
8 stated at *3:

9 “Unless withdrawn, an attorney’s statements in court, on behalf of his
10 client, ‘which dispense with proof of facts . . . are not merely evidence
11 as in the case of an ordinary admission. They are absolutely binding.
12 As long as they stand, they foreclose the matter altogether.” Laird v.
Air Carrier Engine Service, Inc., 263 F.2d 948, 953 (5th Cir. 1959).

13 “In a civil proceeding, a client is bound by statements made by his or her
14 attorney made in open court when the statements are made in the client’s presence
15 and are not denied by the client.” Sweat v. Sweat, 641 S.E.2d 1, 2 (Ga. 2007).

16 Here, Plaintiff was in open court with his lawyer, Mr. Foreman, when
17 certain statements were made about the occurrence that is the subject of this
18 lawsuit. Because Mr. Foreman was authorized to speak for Plaintiff, the
19 statements are admissible in this § 1983 lawsuit.
20

21 VI. CONCLUSION

22
23
24

1 The Court should admit the statements of Plaintiff's lawyer that Plaintiff
2 admits were made on Plaintiff's behalf at the time that Plaintiff was convicted of
3 felony assault of a police officer.

4
5 RESPECTFULLY SUBMITTED this 17th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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DATED this 17th day of July, 2013 at Ephrata, WA.

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